(21)

No. 97-829

IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

IOWA UTILITIES BOARD, *et al.,*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit, in disregard of *Chevron*, improperly invalidated regulations promulgated by the FCC implementing the 1996 Act that prohibit incumbent local monopolists from engaging in discriminatory conduct against new entrants seeking to lease parts of the incumbents' existing local telephone networks, and thereby thwarted Congress' goal of creating competition in local markets as quickly as possible.

2. Whether, in light of the explicit grants of authority to the FCC to establish regulations to implement the requirements of both the Communications Act and the local competition provisions of the Telecommunications Act of 1996 amending the Communications Act, the Eighth Circuit improperly held that the FCC exceeded its jurisdiction when it promulgated regulations implementing the federal pricing requirements of the 1996 Act, on the theory that the regulations applied to intrastate matters that had traditionally been subject to the jurisdiction of state public utility commissions.

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings in the Eighth Circuit are listed at Pet. App. 1a-4a, 73a-79a, 92a.

Pursuant to Supreme Court Rule 29.6, petitioners state as follows:

MCI Telecommunications Corporation is a wholly-owned subsidiary of MCI Communications Corporation. MCI Telecommunications Corporation has the following non-wholly owned subsidiaries: General Communications, Inc.; IFP Holdings, Inc.; ICS Communications, Inc.; Digital Network Television, Inc.; Genesys Telecommunications, Inc.; Inflight Phone Corp.; Multimedia Medical Systems, Inc.; News T Investments, Inc.; News Triangle Finance, Inc.; Pioneer Holding L.L.C.; and Security Technologies, Inc.; Portugal Telecom.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

PETITIONER'S BRIEF ON THE MERITS

JURISDICTION

The Eighth Circuit issued its decision on rehearing and its mandate on October 14, 1997. This Court has jurisdiction under 28 U.S.C. § 1254(1).[1]

STATUTORY PROVISIONS INVOLVED

This case involves the Telecommunications Act of 1996 (the "1996 Act"), Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151-276. Relevant provisions are reprinted at Pet. App. 93a-130a.

STATEMENT OF THE CASE

MCI seeks reversal of the Eighth Circuit decision vacating FCC regulations that implement the 1996 Act, a landmark statute designed "to shift monopoly [telephone] markets to competition as quickly as possible."[2] In the 1996 Act, Congress asserted federal jurisdiction over local telecommunications matters that had previously been left to the States. Congress did so because historically the States had fostered monopoly provision of local telephone service, and Congress desired a uniform national policy "promot[ing] competition in the local telephone service market." *Reno v. American Civil Liberties Union*, 117 S. Ct. 2329, 2338 (1997). Specifically, Congress preempted all state laws that would restrict competition in local markets (47 U.S.C. § 253(a)) and required local telephone companies to make the local phone networks available for use by new competitors (47 U.S.C. §§ 251-252). Congress required the FCC to "establish regulations to implement" those new federal requirements within six months of the Act's passage. 47 U.S.C. § 251(d)(1). The FCC did so, but the Eighth Circuit invalidated many of those regulations, crippling the prospects for local competition.

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[1] The Court of Appeals had jurisdiction to review the FCC's regulations pursuant to 28 U.S.C. § 2342(i) and 47 U.S.C. § 402(a), (b).

[2] *See* H.R. Rep. No. 104-204 at 89 (1995) ("H. Rep.").

The Regulatory Structure Prior to 1996. The nation's telephone system consists of local and long distance networks. A local network is an integrated system of wires and switches that connects all homes and businesses in a defined local service area. The long distance network consists of wires and switches that transmit telephone calls between local networks. The local network is used to provide local telephone service and is also indispensable to long distance service. A long distance call initiated by a customer first travels on a local network from the customer's premises to a point where it is handed off to a long distance company, which then transports the call to a distant point, where it is handed off to a second local network for completion. Prior to 1984, the Bell System operated an integrated network that provided local phone service in regions covering more than 80% of the nation's homes and businesses, and nearly 100% of all long distance service.

The Communications Act of 1934 divided responsibility for regulation of telecommunications markets into well-defined (albeit overlapping) spheres: federally-regulated interstate long-distance services, and state-regulated intrastate services. 47 U.S.C. § 152. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986). Under this regulatory framework, state and federal regulators pursued fundamentally different goals. The States uniformly preferred a monopoly rate-of-return regime in which regulators could—through maintaining supracompetitive rates to some classes of customers, and subsidizing others—set intrastate retail prices that ostensibly ensured "universal service," but in fact responded more to political than to markets forces. *See generally* M. Kellogg et al., *Federal Telecommunications Law* 68 (1992). As Congress noted, incumbent local telephone companies historically have "been protected from competition by State and local government barriers to entry." H. Rep. at 49. In contrast, federal regulators in the last three decades promoted competition in the interstate long-distance market, and in doing so required local carriers to allow new long distance

competitors (such as MCI) to use the local network on reasonable terms to originate and terminate interstate long distance calls.[3]

The FCC's efforts to make the interstate market competitive were resisted by the Bell System, which used its control over local networks to discriminate against these new competitors in ways that evaded regulatory control. To halt that anticompetitive conduct, the Department of Justice brought a pivotal antitrust suit which resulted in the consent decree that broke up the Bell System. *See United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983). That decree divested AT&T of the Bell Operating Companies ("Bell Companies"), which provided monopoly local service, and barred those divested companies from the long distance market to preclude any future possibility that they might use their control over local networks to harm long-distance competition. As a result, there is now vibrant long distance competition. *See AT&T Reclassification*, 11 F.C.C.R. 3271, 3307-08 (1995).

Notwithstanding these pro-competitive changes in the interstate market, the States persisted in suppressing competition in local markets. Local incumbents, including the individual companies spawned from the former Bell System, continued to operate their monoply franchises, while "state regulators helped sustain the [incumbents'] bottleneck control, arguably because they preferred the subsidies and price-averages the local monopoly allowed."

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[3] Specifically, the FCC required incumbents to connect existing local networks with the facilities of the new competing long distance carriers so that customers could choose among competing long distance providers. *E.g., Specialized Common Carriers*, 29 F.C.C.2d 870 (1971), *aff'd sub nom. Washington Util. Comm'n v. FCC*, 513 F.2d 1142 (9th Cir. 1975). State public utility commissions and the incumbents unsuccessfully challenged these federal actions on the ground that they impermissibly invaded the States' authority over intrastate matters. *E.g., North Carolina Util. Comm'n v. FCC*, 537 F.2d 787, 791-94 (4th Cir. 1976); *National Ass'n of Reg. Util. Comm'rs v. FCC*, 880 F.2d 422, 431 (D.C. Cir. 1989).

SBC Communications, Inc. v. FCC, No. 97-1425, 1998 WL 121492 at *1 (D.C. Cir. Mar. 20, 1998) (quotation omitted). By 1996, the incumbent local carriers were still receiving over 99% of all local service revenues.[4]

The 1996 Act. In the 1996 Act, Congress radically changed the allocation of regulatory authority that had existed under the 1934 Communications Act, as well as the substantive policies that had prevailed under the old regime. Abandoning its acquiescence in state-regulated local monopolies, Congress preempted any state laws and regulations that "prohibit, or have the effect of prohibiting, the ability of any entity to provide any . . . intrastate telecommunications service." 47 U.S.C. § 253(a). Congress also mandated termination of the practice of implicit subsidies by which some customers paid below-cost retail rates while others paid inflated rates—requiring instead that "universal service" be assured through explicit subsidies funded by telecommunications carriers on a competitively neutral basis. *Id.* § 254. Congress recognized, however, that merely removing these regulatory impediments to competition would not make local markets competitive. It therefore went further and adopted uniform substantive federal requirements designed to reduce barriers to entry by authorizing new entrants to make use of existing local networks. Those requirements are at issue here.

Section 251 establishes three complementary routes new entrants can use to compete in local markets, each involving different economic characteristics and different physical arrangements. The first is pure facilities-based competition—that is, the construction of competing networks. A new entrant constructing its own network facilities must be allowed to "interconnect" with the incumbent's network. The 1996 Act therefore requires "interconnection." 47 U.S.C. § 251(c)(2). Without this net-

[4] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 11 F.C.C.R. 14171 at ¶ 6 & n.13 (1996) (JA 8-9) ("NPRM").

work-to-network interconnection, a new entrant's phone service would have limited value because the new entrant's customers could not make calls to or receive calls from the incumbent's customers. But even with mandatory interconnection, this form of competition will take years to emerge "because the investment necessary [to build a competing network] is so significant." *See* H.R. Conf. Rep. No. 104-458 at 148 (1996) ("Conf. Rep.").[6]

The Act's second route for entry is "resale." § 251 (c)(4). Incumbents must permit new entrants to purchase their retail services at wholesale rates so that new entrants can compete by reselling these services under a different brand to retail customers. Resale allows quick and widespread entry. But resale presents only limited opportunities for price competition because the wholesale rate is calculated by subtracting from the retail rate the incumbents' "avoided costs"—that is, the costs the incumbent will save by virtue of being a wholesaler (47 U.S.C. § 252(d)(3)). Resale alone will not, therefore, drive retail prices to the cost-based levels that would prevail in a competitive market. Nor does the resale option permit innovation; new entrants may resell only the same services the incumbent offers its local customers.

The Act's third route for entry is leasing designated elements of the existing local network. Section 251(c)(3) requires incumbents to provide to new entrants "nondiscriminatory access to network elements on an unbundled basis . . . in a manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service." This provides new entrants with the flexibility to order some or all of the following basic components of the local network: (i) the interface box attached to the outside of the home or business connecting the phone line to the wires inside the home or business; (ii) the "local loop," which is the line that runs

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[6] The FCC estimated that an investment of more than $29 billion would be required today to construct local networks capable of reaching even 20% of available subscribers. NPRM, ¶ 7 & n.15 (JA 9-10).

from the interface box at the customer's premises to the nearest switching center; (iii) the telephone "switches" (to which the local loops connect) which are essentially large computers that direct calls to their intended destinations; (iv) "transport" facilities, the wires that carry calls between switches; and (v) databases and other related support services. Making use of these elements, a new entrant could build its own switches and transport facilities while leasing wire loops and interface boxes from the incumbent to reach customers' homes. Or a new entrant could rely entirely on components of the incumbent's network, but use them to offer services the incumbent does not currently offer, or to compete in ways resale does not permit.

Recognizing that the price charged new entrants for these uses of the local network would determine the viability of these entry strategies, Congress established specific substantive federal requirements governing pricing. These federal pricing requirements were intended not only to ensure that new competitors would enter the market, but also that they would do so on an economically efficient basis. Thus, Congress required that these rates must be "just, reasonable and nondiscriminatory," and "based on . . . cost," 47 U.S.C. §§ 251(c)(3), 252(d)(1), and Congress specifically prohibited the traditional "rate of return" proceedings in which state regulators had set monopoly rates. § 252(d)(1).

The 1996 Act also sets forth procedures for translating these substantive federal requirements into action. Congress empowered new entrants to request interconnection, access to network elements, or resale, and required incumbents to negotiate with new entrants over these items. § 251(c)(1). Anticipating that incumbents would be unlikely to agree to terms that allow a new entrant to take away their customers, Congress gave state public utility commissions (or, if they are unwilling, the FCC) authority to adjudicate under federal law all disputed issues in a process the Act refers to as "arbitration." This process results in an "interconnection agreement" incor-

porating final terms (both negotiated and adjudicated).[6] §§ 252(b), (c). Congress placed tight time deadlines on this process: States are required to arbitrate final "interconnection agreements" within nine months of the time a new entrant first requests negotiations. § 252(b)(4)(C).

Congress assigned this adjudicatory role to state commissions because of their familarity with local conditions, but Congress was quite explicit that substantive federal law would govern resolution of any disputed issues. § 252(c)(1) (state commission shall "ensure that such resolution [of any open issues] . . . meet[s] the requirements of [§] 251 . . . including the regulations prescribed by the Commission pursuant to [§] 251"). To ensure that uniform federal standards were in place before § 252's negotiation and arbitration process commenced in earnest, Congress directed the FCC to "complete all actions necessary to establish regulations to implement the requirements of [§ 251]" within 6 months of passage of the 1996 Act. § 251(d)(1). As the Conference Committee explained, "it is important that the Commission rules to implement new section 251 be promulgated within 6 months after the date of enactment, so that potential competitors will have the benefit of being informed of the Commission['s] rules in requesting access and interconnection." Conf. Rep. at 148-49. As a further guarantee of uniformity, Congress granted federal courts exclusive jurisdiction to review state commission actions to ensure compliance with the requirements of §§ 251 and 252. § 252(e)(6). *See also* § 252(e)(4) (denying state courts jurisdiction to review interconnection agreements).

Finally, the local competition provisions of the 1996 Act also play a critical role in the process of determining whether the divested Bell Companies will be allowed to provide long distance service in their regions. Section 271 gives the FCC the responsibility to decide whether the Bell Companies will be allowed to enter long distance

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[6] These "interconnection agreements" cover more than just "interconnection" provided by § 251(c)(2) of the Act, and include as well all terms related to access to unbundled elements and resale.

markets from which they are presently barred. In doing so, the FCC must determine whether the Bell Company has met a "competitive checklist," which includes many of the requirements of §§ 251 and 252—including, in particular, the pricing requirements. § 271(c)(2)(B).

The FCC Regulations. The FCC issued regulations on August 8, 1996. Two critical components of those regulations are at issue here. First, the FCC's Order implemented the 1996 Act's requirements concerning the prices competitors pay to interconnect with the incumbents' networks and to lease network elements. The FCC decided it was "critical . . . to establish among the States a common, pro-competition understanding of the pricing standards" that would govern relations between new entrants and incumbents. *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 F.C.C.R. 15499 (1996) at ¶ 618 (JA 131) (*"Local Competition Order"*). The regulations accordingly establish a basic pricing methodology for state commissions to apply in establishing actual rates in light of particular local conditions. *See Local Competition Order* ¶¶ 618-954 (JA 719-879). The FCC determined that prices had to be based on the forward-looking economic cost of each of the leased elements as reflected in a methodology known as "Total Element Long Run Incremental Cost," or "TELRIC." As the FCC explained, setting prices at forward-looking cost is most consistent with the 1996 Act's goal of creating efficient competition as quickly as possible because it replicates the costs new entrants would incur in entering a competitive market, allowing them to price their own retail offering at levels that would prevail in a competitive market, and thereby "driv[ing] retail prices to their competitive levels." *Local Competition Order* ¶ 679 (JA 138).[7]

Second, the FCC issued regulations implementing the statutory unbundling requirements of § 251(c)(3), which

[7] The FCC's pricing regulations also implement the statutory provisions governing resale prices and prices for transport and termination. 47 U.S.C. §§ 251(c)(4), 252(d)(2), 251(b)(5).

require "nondiscriminatory access" to network elements. One of these FCC rules dealt with requests to incumbents to provide elements that were *already connected* in their networks; it prohibited incumbents from disconnecting those already-connected elements solely for the purpose of making it more difficult and expensive for competitors to use them. 47 C.F.R. § 51.315(b). The FCC concluded that this prohibition was compelled by the text of § 251(c)(3). *Local Competition Order* ¶ 293 ("section 251(c)(3) bars incumbent LECs [local exchange carriers] from separating elements that are ordered in combination"), Pet. App. 231a-232a. As the FCC observed, absent such a rule, new entrants "would be seriously and unfairly inhibited in their ability to use unbundled elements to enter local markets." *Id.*

Proceedings in the Eighth Circuit. As soon as the regulations were published, the incumbents (joined by various state utility commissions on some issues) challenged them. Pursuant to 28 U.S.C. § 2112(a)(3), the cases were consolidated in the Eighth Circuit. That court issued a decision on the merits on July 18, 1997, which it modified on rehearing on October 14, 1997. The court first held that the FCC lacked plenary authority to promulgate the regulations implementing the requirements of § 251. Although the 1996 Act expressly required that "[w]ithin 6 months . . . the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section [251]," (47 U.S.C. § 251(d)(1)), the court held that this statutory command was "primarily a time constraint, directing the Commission to complete expeditiously its rulemaking regarding only the areas in section 251 where Congress expressly called for the FCC's involvement." Pet. App. 12a. The court also rejected the FCC's reliance on its comprehensive authority under § 201(b) of the Communications Act, 47 U.S.C. § 201(b), to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act," on the ground that § 201 authorized only regulation of common carriers

engaged in "interstate or foreign communication." Pet. App. 12a.[8]

Believing the FCC lacked plenary rulemaking authority, the court held that the FCC could implement only six specific narrow substantive requirements of § 251 where Congress had "expressly" mentioned particular attributes of the Commission's regulatory powers.[9] Outside these six areas *any* FCC action was held to be *ultra vires* because Congress intended for the States, not the FCC, "to dictate the substantive standards" necessary to implement the Act's federal requirements. Pet. App. 29a-30a. Chief among the many areas over which the FCC allegedly lacked jurisdiction is price. The court held that because of "[t]he absence of any direct FCC pricing authority over local telephone service," Pet. App. 13a, the FCC had violated the "plain meaning" of the Act in concluding that it could issue pricing regulations. Pet. App. 14a-15a & n.15.

The court held that the FCC's pricing regulations were also barred by § 2(b) of the original 1934 Communications Act, 47 U.S.C. § 152(b), which provides that "nothing in this chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service." The court of appeals described § 2(b) as a "fence that is hog tight, horse high, and bull strong, preventing the FCC from intruding on the states' intrastate turf," Pet. App. 23a, and concluded that even though the 1996 Act's

[8] For similar reasons, the court also concluded that the FCC could not use its traditional enforcement authority under § 208, to enforce *any* of the 1996 Act's local competition requirements in administrative complaint proceedings. Pet. App. 30a-34a.

[9] Pet. App. 12a & n.10. *See* § 251(b)(2) (number portability), § 251(c)(4)(B) (prevention of discriminatory conditions on resale), § 251(d)(2) (identification of network elements), § 251(e) (numbering administration), § 251(g) (continued enforcement of exchange access), and § 251(h)(2) (treatment of comparable carriers as incumbents).

pricing provisions clearly apply to intrastate services, Congress additionally needs to set out "an unambiguous grant of intrastate authority to the FCC [for it] either to jump over or pass through section 2(b)'s fence," Pet. App. 17a. The Eighth Circuit concluded that in the 1996 Act Congress acted in "exactly the opposite" manner, because "the Act directly and straightforwardly assigns to the states the authority to set the prices." *Id.*[10]

The Eighth Circuit then considered the substantive validity of the remaining rules it found to be within the FCC's jurisdiction. The court upheld many of the FCC's rules but struck down others as inconsistent with the Act's plain meaning.[11] The court initially upheld 47 C.F.R. § 51.315(b), the prophylactic rule barring incumbents from discriminating against new entrants by breaking apart existing combinations of network elements prior to providing them. On rehearing, however, the court invalidated § 51.315(b). In the court's view, when a competitor requests two network elements that are already combined, the incumbent is to "uncombine" them, and the competitors must then do the "actual [re]combining" of those elements. Pet. App. 52a-53a.

SUMMARY OF ARGUMENT

The court of appeals unlawfully vacated critical FCC regulations implementing the 1996 Act, which was enacted

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[10] Relying on § 2(b) the court also vacated FCC regulations concerning exemptions for rural carriers, Pet. App. 30a; the FCC's jurisdiction to hear complaints concerning local competition issues under § 208, *id.* at 31a-32a; and the standards for reviewing interconnection agreements entered into before the effective date of the Act, *id.* at 34a.

[11] The court vacated as unreasonable or contrary to the Act's plain meaning the FCC's regulations implementing the 1996 Act's "pick and choose" provision, Pet. App. at 24a-27a; rules implementing the agency's interpretation of the preemptive effect of its own regulations, *id.* at 36a-40a; rules implementing the agency's interpretation of "the standards to determine which elements must be unbundled," *id.* at 46a; and rules implementing the agency's interpretation of the quality of access incumbents must provide to competitors, *id.* at 50a-52a.

to bring competition to monopoly local telephone markets as quickly as possible.

First, the court improperly vacated Rule 315(b), the FCC rule that protected new entrants from discriminatory treatment when they lease elements of the incumbent local telephone companies' telephone networks. That rule is a straightforward implementation of the requirement of § 251(c), imposing on incumbent monopolists the "duty to provide [to a new entrant] *nondiscriminatory* access to network elements on an unbundled basis."

The court erred in finding this rule inconsistent with the plain meaning of the word "unbundled" in § 251(c). The uniform dictionary definition of "unbundle" is "separately priced," *not* "physically disconnected," and that has also been the FCC's consistent historical understanding of the term. The Eighth Circuit's preferred definition also is irreconcilable with other provisions of § 251(c), including in particular that section's requirement of nondiscriminatory access to network elements. It was error under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), for the court to vacate Rule 315(b) on this ground. The policy rationales offered by the court of appeals in support of its unlawful construction of the statute are equally flawed, and show only how far the court departed from a reasonable interpretation of the statute and from the rule of judicial deference to reasonable agency actions. Point I.

Second, the court of appeals erred in concluding that the FCC lacked jurisdiction to issue regulations implementing the pricing provisions of the 1996 Act. In promulgating these regulations for interconnections and elements obtained under § 251, the FCC properly relied on its plenary authority to "establish regulations to implement the requirements of § 251," 47 U.S.C. § 251(d)(1), and to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b). The court of appeals' conclusion that the FCC had no general authority to issue

regulations to implement the provisions of the 1996 Act was plain error, based on clear misreadings of the statutory text.

Believing the FCC to lack broad rulemaking authority, the court erroneously looked exclusively to the pricing provisions themselves to determine whether the FCC was given the authority to make rules establishing a pricing methodology. In concluding that the statute instead gave such jurisdiction exclusively to the states, the court failed to acknowledge that the state commissions' authority to set rates indicates nothing at all about the FCC's broader rulemaking authority to prescribe a pricing methodology. Nothing in § 252 of the Act limits the FCC's authority to make rules to implement the provisions of the 1996 Act. Point II(A).

Any other result would be inconsistent with the structure and purpose of the 1996 Act. As a result of the Eighth Circuit's invalidation of the regulations implementing the Act's pricing requirements, disputes over pricing methodology are being resolved piecemeal through drawn out litigation in the federal courts, delaying the onset of local competition that Congress sought to ensure. Denying the FCC the authority to address pricing also is flatly inconsistent with § 271 of the Act, which requires the FCC to determine whether local phone companies can begin to offer long-distance service in their regions. Section 271 specifies that the FCC must consider interconnection and element prices when it makes that determination. Ultimately, the court failed in its obligation to give the statute an interpretation that makes sense of its terms as well as its practical operation. Point II(B).

Finally, nothing in § 2(b) of the 1934 Communications Act supports the court's jurisdictional ruling. That provision states that nothing in the Communications Act should be construed to apply to intrastate matters or to give the FCC jurisdiction over those matters. But here, no construction is necessary: the 1996 Act plainly both applies to intrastate matters and gives the FCC jurisdiction over those matters. Moreover, § 2(b) ensures that the FCC

not assert preemptive ancillary jurisdiction over intrastate matters that Congress has left to the States. Here, Congress plainly has regulated intrastate telephone service and preempted state law, and the FCC has not regulated any further than Congress has legislated. Additionally, Congress intended that the interconnection agreements contain a single set of rates, terms, and conditions that apply without distinction to both interstate and intrastate services. Because separation of the intrastate aspects from the interstate aspects would be contrary to that congressional intent, § 2(b) is no bar to FCC regulation. Point II(C).

ARGUMENT

I. THE EIGHTH CIRCUIT'S DECISION INVALIDATING RULE 315(b) CONSTITUTED IMPROPER JUDICIAL POLICYMAKING IN CONTRAVENTION OF *CHEVRON.*

The Eighth Circuit's invalidation of Rule 315(b), 47 C.F.R. § 51.315(b), violates the "dominant, well-settled principle of federal law" requiring "judicial deference to reasonable interpretations by an agency of a statute that it administers." *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992).

Rule 315(b) implements § 251(c)(3) of the 1996 Act, which imposes on incumbents

> the duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis . . . on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the . . . requirements of this section and section 252. . . . An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

47 U.S.C. § 251(c)(3). In particular, Rule 315(b) implements § 251(c)(3)'s requirement of "nondiscriminatory access." The Rule provides that "[e]xcept upon re-

quest an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." 47 C.F.R. § 51.315(b). *Local Competition Order* ¶ 293, Pet. App. 231a-232a.

As the FCC explained in detailed findings, *id.*, ¶¶ 289-341 (JA 550-76), Rule 315(b) anticipates and proscribes a blatant form of discrimination. For example, under the FCC's rules, a new entrant may lease from the incumbent the telephone wire (or "loop") that runs from a customer's house to the incumbent's switch, and the switch itself. In such cases, Rule 315(b) prohibits the incumbent from responding to such a request by separating the loop from its connection to the switch, thus forcing the competitor to reconnect the two elements(if it can), and interrupting the customer's phone service in the interim. Such disconnection of elements ordered in combination, if allowed, would add substantially to the costs of would-be competitors. By contrast, when an *incumbent* begins serving a local customer who has just moved into a house, *it* does not senselessly break apart the constituent parts of its network and then piece them back together prior to providing service—and thus does not bear any cost of "recombining" the elements into a finished service. It just enters new data in its computers. In promulgating Rule 315(b), the FCC simply placed the potential competitor in the same position as the incumbent, preventing the incumbent from exploiting its position as a monopoly vendor to favor itself by unilaterally imposing pointless and discriminatory costs on its rivals.

The Eighth Circuit nevertheless held that Rule 315(b) was contrary to the plain meaning of § 251(c)(3). The court read the statute's requirement that elements be provided on an "unbundled basis" as meaning that the incumbent is to provide the elements in separated form, and for that reason concluded that any requirement that incumbents provide elements in combination violated the statute.

As will be demonstrated, that ruling constituted a wholly inappropriate usurpation of the FCC's proper role

in interpreting and administering the unbundling requirements of § 251(c)(3). First, as the FCC concluded on the basis of detailed findings (that the Eighth Circuit did not so much as mention), Rule 315(b)'s antidiscrimination rule is not merely permitted by the text of § 251(c)(3)—it is compelled by that text. Second, in all events, the FCC's interpretation of § 251(c)(3) is surely a permissible one. *See Chevron,* 467 U.S. at 842-44. "Unbundling" means separate pricing, not physical separation —as multiple dictionary definitions, consistent prior regulatory usage of the term, and the structure and purposes of the 1996 Act all unequivocally show. And as the FCC's findings make clear, the Eighth Circuit's reading of the term is irreconcilably in conflict with § 251(c)(3)'s requirement of "nondiscriminatory access." Third, the policy rationale offered by the Eighth Circuit to support its decision—that permitting the imposition of such discriminatory costs is necessary to preserve a distinction between resale and the use of unbundled elements—represents wholly unsupported speculation and is in fact contradicted by unchallenged FCC findings.

A. Rule 315(b) Implements the Requirement of the Plain Language of the Statute to Provide Nondiscriminatory Access to Network Elements.

In the administrative record, the FCC explained in detail why Rule 315(b) is necessary to enforce the statutory mandate of nondiscriminatory access to network elements. *Local Competition Order* ¶¶ 289-341 (JA 550-76). The FCC determined that the language of § 251(c) requiring "nondiscriminatory access to network elements on an unbundled basis" "bars incumbent LECs from imposing limitations, restrictions, or requirements on requests for, or the sale or use of, unbundled [network] elements that would impair the ability of requesting carriers to offer telecommunications services in the manner they intend." *Id.* at ¶ 292, Pet. App. 230a-231a. Because "t[he] incumbent LECs have little incentive to . . . provision unbundled elements in a manner that would provide efficient competitors with a meaningful opportunity to compete," but

rather "have the incentive and the ability to engage in many kinds of discrimination," ¶ 307 (JA 55-56), the agency determined that "some national rules regarding nondiscriminatory access will reduce the costs of entry and speed the development of competition." *Id.* at ¶ 308 (JA 56).

The FCC then concluded that a rule prohibiting incumbents from discriminatorily separating elements that are already combined in its network was necessary to enable new entrants to make use of combinations:

> in practice it would be impossible for new entrants that lack facilities and information about the incumbent's network to combine unbundled elements from the incumbent's network without the assistance of the incumbent. If we [permit incumbents to separate combined elements and require requesting carriers to recombine them], we believe requesting carriers would be seriously and unfairly inhibited in their ability to use unbundled elements to enter local markets.

Id. at ¶ 293, Pet. App. 231a-232a (footnote omitted).

None of these findings has been challenged as unreasonable or unsupported by the administrative record. Thus, they must be accepted as conclusive here.

B. The Eighth Circuit Erred in Concluding That the Statutory Text Unambiguously Foreclosed the FCC's Interpretation of the Statute.

Even if the FCC erred in concluding that Rule 315(b) was *compelled* by the text of § 251(c)(3)—and it did not—the Eighth Circuit's decision to invalidate that rule still is wrong because the FCC's judgment is entitled to "controlling weight unless [it is] arbitrary, capricious or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844; *Holly Farms Corp. v. NLRB*, 116 S. Ct. 1396, 1402 (1996) (agency interpretation must be upheld unless "inevitable construction" of statute precludes it). Moreover, because Congress expressly authorized the FCC "to prescribe legislative rules" implementing the 1996 Act's

substantive unbundling requirements, the Eighth Circuit "owe[d] the Commission's judgment more than mere weight or deference." *United States v. O'Hagan*, 117 S. Ct. 2199, 2217 (1997). As will be demonstrated, the FCC's judgment in this matter should have been conclusive.

The Eighth Circuit concluded that Rule 315(b) is contrary to law because § 251(c)(3) unambiguously "requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis." Pet. App. 71a. To reach this conclusion, the Eighth Circuit interpreted the requirement in the first sentence of § 251(c)(3)—that incumbents have "[t]he duty to provide . . . access to network elements on an unbundled basis"—to mean that the incumbents' only obligation is to provide network elements in a *separated form*. The court then interpreted the second sentence of § 251(c)(3)—stating that incumbents must "provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service"—as meaning that potential competitors (not incumbents) are responsible for physically reconnecting the elements. Pet. App. 70a. But these are not "inevitable construction[s]" of the statutory text. To the contrary, the Eighth Circuit's construction of the statute is plainly wrong. *See Holly Farms*, 116 S. Ct. at 1402.

First, the incumbent's statutory "duty to provide . . . nondiscriminatory access to network elements on an unbundled basis" does not unambiguously mean that the incumbent has the right to separate its network into its constituent physical components and to provide each of those components only in *separated* form. To the contrary, as the FCC recognized, the dictionary definition of the term "unbundled" is "to separate the *charges* for (related products and services usually offered as a package)." *Random House Dictionary of the English Language*, p. 2005 (2d Ed. Unab. 1981) (emphasis

added).[12] The existence of multiple dictionary definitions supporting the FCC's interpretation alone is enough to overturn the Eighth Circuit's conclusion that the statutory text unambiguously foreclosed that interpretation. *See National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. at 418-19. Indeed, in the Notice of Proposed Rulemaking in this very proceeding the FCC relied on these dictionary definitions in proposing that "unbundled" be given its normal meaning of "separately available at a separate price," and the incumbents' trade association endorsed that definition.[13]

Moreover, the FCC's reading of "unbundled" is consistent with the FCC's uniform regulatory use of that term over the 15 years prior to passage of § 251(c)(3). When the FCC in 1980 provided for the "unbundling" of telephone sets from local service, that meant that telephone sets were to be *priced* separately from local service, so the customer would have the option of replacing the incumbent-supplied telephone with a telephone from another vendor, or of continuing to lease the phone from the incumbent at a separate price. Unbundling did not give the incumbent the right like the one that respondents now assert, to rip the phone from the customer's wall, forcing the customer to reconnect it.[14] Separate pricing was also the uniform interpretation given the term when the FCC unbundled the features used to provide computer-

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[12] *See also Webster's New Collegiate Dictionary* (Merriam, 1981), p. 1263 ("to give separate prices for equipment and supporting services . . . to price separately"); *American Heritage Dictionary*, p. 1315 (2d Col. Ed. 1991) ("[t]he separate pricing of goods and services").

[13] NPRM at 86 & n.116 (JA 11). *See* Comment of the United States Telephone Association, p. 26 (May 16, 1996).

[14] *Second Computer Inquiry*, 77 F.C.C.2d 384, 388-89, 443-44 (1980), *aff'd sub nom., Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982).

related services, and other aspects of the network.[16] When Congress used the same term in the 1996 Act, it is presumed to have known of this well-established meaning. *See McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991).

The Eighth Circuit's reading of the term "unbundled" in § 251(c)(3) to mean "separated" also conflicts irreconcilably with the 1996 Act's definition of "network elements." (47 U.S.C. § 153(29)). As the appeals court recognized elsewhere in its opinion, network elements consist not only of the "physical parts" of an incumbent's network, but also of "features, functions, and capabilities" that do not correspond to individual, physically separate parts of the network. Pet. App. 42a-43a. For example, Congress expressly identified "signaling" as a network element. 47 U.S.C. § 153(29). But signaling is an electronic stream shared by all customers whose calls are routed through a particular switch. It cannot be "separated" from the switch without disrupting many of the calls being routed through the switch. When Congress commanded that signaling be "unbundled" as a discrete "network element," it cannot possibly have intended that signaling be separated from the rest of the network. Rather, it meant that signaling, as all other elements, be "priced separately."

Second, the Eighth Circuit's interpretation of the term "unbundled" is in conflict with the express requirement of § 251(c)(3) that new entrants be provided with "nondiscriminatory access" to network elements. As the FCC explained, forcing competitors to take network elements on a disassembled basis when they are already combined in an incumbent's network "would impose costs on competitive carriers that incumbent LECs would not incur,

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[16] *Third Computer Inquiry*, 104 F.C.C.2d 958, 1064-66 (1986) ("unbundling" means that "competitors will pay only for Basic Service Elements that they use"), *vacated on other grounds, California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); *Inside Wiring*, 59 Rad. Reg. 2d 1143, 1151-53 (1986), *aff'd, NARUC v. FCC*, 880 F.2d 422 (D.C. Cir. 1989).

and thus would violate the requirement under section 251(c)(3) that incumbent LECs provide nondiscriminatory access to unbundled network elements."[10] As the FCC noted, the text of § 251(c)(3) compelled the antidiscrimination rule it promulgated. *Local Competition Order,* ¶ 293, Pet. App. 231a-232a. The Eighth Circuit, however, made no effort to reconcile its ruling with the express nondiscrimination provision in the statutory text, and instead ignored the very premise of the FCC's decision to promulgate Rule 315(b). That was fundamental error. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 118 S. Ct. 956, 962 (1998); *John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank,* 510 U.S. 86, 94-95 (1993) (courts must be "guided not by a single sentence or member of a sentence, but [by] look[ing] to the provisions of the whole law, and to its object and policy") (citation omitted). Because the Eighth Circuit's construction of the term "unbundled" cannot be harmonized with the statutory requirement of "nondiscriminatory access," it cannot possibly be the sort of "inevitable construction" necessary to overturn the agency's judgment.

This conclusion is not undercut by the second sentence of § 251(c)(3) which requires incumbents to "provide such unbundled network elements in a manner that allows requesting carriers to combine" them into a "telecommunications service." Indeed, that sentence supports the FCC's conclusion. The appeals court believed the "plain meaning" of this provision to be that new entrants have the obligation to put together that which the incumbents have taken apart. But this meaning is based on the assumption that "unbundling" and "combining" are antonymous terms connoting actions taken by an incumbent and a new entrant, respectively, to break apart and put back together the telephone network. The statute's text,

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[10] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* Third Order on Reconsideration, 12 F.C.C.R. 12460, at ¶ 44 (1997), *petitions for judicial review pending on other grounds, U S West Inc. v. FCC,* Nos. 97-3576 et al. (8th Cir. filed Sept. 5, 1997) (JA 247).

however, does not purport to allocate responsibilities in this way. "Combine" plainly means that competitors can offer the elements to customers in combination with other elements, and the Act employs that term to forbid incumbents from artificially restricting the combinations, or uses, to which new entrants can put network elements.

In sum, the FCC's regulation is not "unambiguously foreclosed" by the text of § 251(c)(3), and the Eighth Circuit therefore erred in striking down the regulation. The regulation prohibits a form of "discriminatory access to network elements" and implements a statutory mandate expressly forbidding such discrimination. It is the Eighth Circuit that has misread the statutory text, and this Court should reinstate Rule 315(b).

C. The Eighth Circuit's Policy Rationale Is Insupportable.

What we have shown is sufficient to require reversal. In addition, there is no plausible policy justification for the Eighth Circuit's decision. That court adopted its strained reading of the statute to alleviate its concern over one permissible entry strategy. It feared that new entrants might lease all of the incumbent's network elements in combination at a lower cost than the cost of purchasing local telephone service for resale, thereby effectively "obliterat[ing] the careful distinctions Congress has drawn" between lease of network elements, and purchase of local telephone service at wholesale rates for "resale" to customers. Pet. App. 71a. Accordingly, the court concluded, without citing any record support, that it was necessary artificially to *raise* the cost of using network elements, so that leasing network elements would not become a less costly way to enter local markets than resale. *Id.* Imposing such burdens is especially necessary, according to respondents, because Congress created resale as an entry vehicle—and priced it in a particular manner—to serve policy objectives that supposedly need to be protected against encroachment by other forms of local competition.

For at least two reasons, this conflict is entirely manufactured.

First, as the FCC determined (again, in findings ignored by the Eighth Circuit), there is no risk of its anti-discrimination rule "obliterating" the distinction between these two different methods of entry, because the two routes of entry are economically quite distinct. *Local Competition Order* ¶¶ 332-334, Pet. App. 244a-246a. The Eighth Circuit's refusal to acknowledge the force of this argument in this context is especially perplexing, because elsewhere in its decision it affirms the right of new entrants to provide service through elements leased entirely from the incumbents, and acknowledges these very differences. Pet. App. 56a-57a.

As determined by the FCC, providers of service through combinations of elements face risks resellers do not. A reseller has a guaranteed margin that can be calculated in advance, because it simply purchases services its customers request, at a discounted rate. It faces no risk of unused capacity. A competitor that provides service through leasing combinations of unbundled network elements, in contrast, bears the risk that it will pay for elements to provide service, while its customers "will not demand a sufficient number of services using that facility for the carrier to recoup its costs." *Local Competition Order* ¶ 334, Pet. App. 245a-246a. A competitor using leased elements must also build internal systems the reseller does not need, to create, bill for and repair the network it builds out of the leased elements. The FCC found as a fact, on the basis of a voluminous record, that network elements and resale establish two entirely distinct modes of entry, and that neither undermines the viability of the other. Pet. App. 243a-244a. The Eighth Circuit had no business substituting its own uninformed understanding of the economics of local telephone competition for these findings of the expert agency.

Second, the court's assumption that there would be an "inherent" economic advantage in competing via combina-

tions of elements rather than resale was based on sheer speculation that lacks any support in the administrative record, and is wrong. The relative advantages and disadvantages of these entry vehicles are determined by any number of factors. Although at present the cost-based rates the Act requires for unbundled elements may impose costs on new entrants in many markets that are less than the wholesale rates provided by the Act's resale provision, that is principally because current resale rates reflect the absence of local competition. Once that competition emerges in earnest, retail rates (and by definition wholesale rates as calculated under the Act) can be expected to decline. In such circumstances there will be no reason to think that either entry vehicle will provide "inherent" cost advantages. Moreover, new entrants' current choices of entry vehicles may well be affected by other contingent factors. In particular, the FCC has authorized new entrants to compete in the market for exchange access—to collect access charges from long distance companies—when the new entrant uses unbundled elements. *Local Competition Order* ¶ 333, Pet. App. 244a-245a. Because those charges are today greatly above cost, new entrants will have strong incentives to compete using entry strategies that allow them to capture some of those revenues. Once those charges are brought into line with cost, as the FCC has announced it intends to do (*In re Access Charge Reform*, First Report and Order, 12 F.C.C.R. 15982 at ¶ 293 (1997)), that incentive will disappear. Thus, even if the Eighth Circuit were correct (and it is not), the court has imposed a permanent solution for what is at most a temporary problem.

In opposing *certiorari*, respondents proposed a separate policy rationale for the Eighth Circuit's campaign to "save" resale. They asserted that the invalidation of Rule 315(b) is necessary to preserve local telephone retail rate structures that contain implicit cross-subsidies benefitting rural residential customers at the expense of high-volume business customers. These so-called "universal service"

subsidies are preserved, the argument goes, when new entrants resell an incumbent's service, because the wholesale price of resold service is set at a discount off the retail price that reflects the implicit universal service subsidies. Because element prices are by law "cost-based," service through elements could lead to retail price competition and so pose a threat to these subsidies. Service through elements with its accompanying price competition therefore needs to be penalized in order to preserve the implicitly subsidized retail rates.

This argument could not be more at odds with the procompetitive letter and spirit of the Act. It ignores Congress' resolve in § 254 of the 1996 Act to *eliminate* the very implicit "universal service" subsidies the respondents would preserve, requiring that "any [universal service] support mechanisms . . . should be explicit, rather than implicit as many support mechanisms are today." [17] The very point of the 1996 Act was to replace a monopoly regime in which prices are set by regulators with a competitive market in which prices are set by market forces. In this new regime, universal service subsidies will be explicit. And Congress expressly commanded that all three forms of competitive entry (resale, facilities-based, and combinations of network elements) become available "as quickly as possible," [18] declining to make universal service reform a precondition for opening local markets to competition via *any* of these three entry strategies. The incumbents, in sum, are arguing that the 1996 Act should be interpreted to protect the very implicit subsidies which Congress sought to extirpate. Their complaint is with the Congress, and not the FCC.

At bottom, both the Eighth Circuit and the respondents fundamentally misconstrue the 1996 Act, which is designed to allow market forces, and not regulators or appellate courts, to dictate to the greatest extent possible the course of competition. The FCC concluded that Congress

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[17] H.R. Conf. Rep. No. 104-458 at 131 (1996) ("Conf. Rep.").

[18] H. Rep. at 89.

did not "express[] a preference for one particular entry strategy," but created alternative paths new entrants could employ "as market conditions and access to capital permit." *Local Competition Order* ¶ 12, Pet. App. 137a-138a. Before the invalidation of Rule 315(b), a new entrant could use one or another entry strategy depending on its cost and the entrant's evaluation of the relative economic potential and risk associated with being an owner, a reseller, or a lessor. The Eighth Circuit's decision to handicap one of these strategies to further a postulated policy objective in the end serves only to compel market participants to compete through inefficient means, or not to compete at all. In this regard, Congress and the FCC understood what the court below did not—that it is bad policy to require competitors to dig up roads to lay down unnecessary phone lines because a regulator has imposed unnecessary costs upon what would otherwise be the rational economic choice to lease the existing lines from the incumbent. And it is contrary to the law for a court to foist this bad policy choice on market participants by contravening the far more sensible policy judgment of the expert agency in which Congress vested the power to make such judgments. *Chevron* dictates that the ruling of the Eighth Circuit be reversed.

II. CONGRESS GRANTED THE FCC PLENARY AUTHORITY TO ISSUE RULES IMPLEMENTING ALL LOCAL COMPETITION REQUIREMENTS OF THE 1996 ACT, INCLUDING ITS PRICING REQUIREMENTS.

The FCC possesses statutory authority to issue regulations implementing all requirements of § 251, including its pricing requirements. The text of both the 1996 Act and the original Communications Act unambiguously confer such authority, and the structure and purposes of the 1996 Act confirm its existence. The Eighth Circuit's decision to strip the FCC of much of that authority has wreaked havoc with the practical operation of the 1996 Act, and has created an incoherent jurisdic-

tional scheme that cannot be justified on federalism grounds or any other.

A. The Statutory Text Unambiguously Grants the FCC Plenary Authority to Implement All Local Competition Requirements of the 1996 Act.

Congress unambiguously gave the FCC the authority to implement all requirements of the 1996 Act. In reaching the contrary conclusion, the Eighth Circuit fundamentally misconstrued the statutory text. It held that the FCC's pricing rules were unlawful because Congress had not authorized the FCC "*specifically* to issue rules governing . . . rates." Pet. App. 12a (emphasis added). But there was no need for such a specific grant of authority because Congress granted the FCC plenary authority to implement all of § 251's requirements. Thus, the fact that the 1996 Act does not contain any language specifically authorizing the FCC to issue pricing regulations (or for that matter any other specific category of regulations) proves nothing.

1. The grant of implementing authority contained in the 1996 Act is straightforward. Section 251(d)(1) authorizes the FCC to "complete *all actions necessary* to establish regulations *to implement the requirements of this section*" within 6 months of the date of enactment. 47 U.S.C. § 251(d)(1) (emphasis added). Section 251 contains the express pricing requirement that rates for interconnection and access to unbundled elements be "just, reasonable, and nondiscriminatory, in accordance with . . . the requirements of this section and [§] 252," which in turn requires that such rates be "based on . . . cost." 47 U.S.C. §§ 251(c)(2), (c)(3), 252 (d)(1). Nothing in the statutory language forbids the FCC from issuing regulations implementing those requirements. Thus, § 251 (d)(1) gives the FCC authority to implement all requirements of § 251, including its pricing requirements.

Even apart from § 251(d)(1), the general rulemaking provisions of the original Communications Act provide

alternative sources of authority sufficient to justify the FCC's pricing rules. Section 201(b) of the Communications Act authorizes the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b). The 1996 Act amended the Communications Act, adding §§ 251 and 252 to that Act. *See* 110 Stat. 61 (1996). Because §§ 251 and 252 are now "provisions of this Act," and Congress did not amend § 201(b) to restrict the FCC's rulemaking authority in any way, this provision plainly authorizes the FCC to issue rules implementing § 251.[19]

The Eighth Circuit's refusal to give effect to these statutory provisions is insupportable. It is not plausible to assert—as the Eighth Circuit did—that § 251 is only a time limit and not a grant of authority, when it is literally both.[20] Nor is there merit to the Eighth Circuit's holding that § 201(b), which authorizes the FCC to carry out all provisions of the Act, applies only to interstate matters. Although the first sentence of § 201(b) does deal with interstate matters, the grant of rulemaking authority is not so confined. The last sentence of § 201(b) grants the FCC authority to implement all provisions of "the Act," not merely the provisions of § 201. It may be that when originally enacted, that statutory language had the effect

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[19] Two other provisions—§ 4(i) and § 303(r)—likewise authorize the FCC to implement *all* of Chapter 5 of the Act, which now includes §§ 251 and 252. 47 U.S.C. § 154(i) ("The Commission may . . . make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions"); 47 U.S.C. § 303(r) (the Commission shall "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act").

[20] *See Krauel v. Iowa Methodist Medical Ctr.*, 95 F.3d 674, 677 (8th Cir. 1996) (noting EEOC authority to issue regulations implementing the ADA under 42 U.S.C. § 12116, which provides that "[n]ot later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this subchapter").

of conferring only interstate rulemaking authority, but that is because the substantive provisions of the 1934 Act applied only to interstate matters. As the Act's substantive scope expanded, the rulemaking authority conferred by § 201(b) necessarily expanded with it. That is the plain meaning—indeed, it is the inevitable meaning—of the statutory text. This is hardly a surprising result: administrative agencies are typically granted rulemaking authority coextensive with the substantive scope of the organic statute they are charged with administering.

The Eighth Circuit's construction of these provisions leads directly to an absurd result—the absence of *any* source of authority for the FCC to implement *any* of the 1996 Act's local competition provisions. That cannot be correct because, as the Eighth Circuit recognized, several provisions of the 1996 Act "expressly called" for FCC involvement. *See* Pet. App. 12a n.10 (citing provisions). But those provisions do not themselves supply the kind of specific and unambiguous grant of rulemaking authority the Eighth Circuit held was required. Those provisions are not *grants* of authority at all. They are, rather, *limitations* on the FCC's authority, *see, e.g.*, § 251(d)(2) ("[i]n determining what network elements should be made available . . ., the Commission shall consider"), or on the States' authority, *see* § 251(c)(4)(B) ("a State commission may, consistent with regulations prescribed by the Commission"). The provisions on which the Eighth Circuit relied *presuppose* the existence of FCC rulemaking authority—and thus confirm that it must have been conferred by some other provision of the Act. *See NationsBank v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 258 (1995) (existence of statutory limitation on grant of authority "presupposes" existence of that authority, and "makes sense only if" authority is elsewhere conferred).

2. Because the statutory text confers plenary rulemaking authority, the FCC's pricing rules must be upheld unless some other provision of the 1996 Act expressly limits that authority. The Eighth Circuit purported to

find such a limitation in § 252(c)(2), which instructs state commissions to "establish . . . rates according to [252(d)]." *See* Pet. App. 14a. ("the Act plainly grants the state commissions, not the FCC, the authority to determine the rates involved in the implementation of the local competition provisions of the Act"). Indeed, the Eighth Circuit concluded that the "plain language" of § 252 denied the FCC any authority to issue pricing regulations. *Id.* at 10a-14a.

Section 252 does no such thing. It merely grants to state commissions the authority to "establish" actual rates to govern particular interconnection agreements. But establishing actual rates and prescribing a pricing methodology are two different things. The former is an adjudicatory task, the latter a prescriptive one. By no stretch of language or logic does giving each State the task of applying Federal rules in a concrete factual context negate the FCC's authority to prescribe general rules for States to apply in carrying out their assigned role. Thus the "plain language" of § 252 does not eliminate the FCC's authority to prescribe rules implementing § 251's pricing requirements.

In truth, the Eighth Circuit's decision rests not on the "plain language" of the 1996 Act, but on a negative inference drawn from what the Eighth Circuit mistakenly believed was legislative silence. Believing wrongly that Congress gave the FCC no plenary rulemaking authority, the appeals court assumed the task of making *ad hoc* judgments about each requirement of § 251, assigning principal implementing responsibility to the FCC or to the States depending on whether the statutory text appeared to contemplate FCC or state action. The court thought it critical that "the absence of any reference whatsoever to the FCC in the sections of the Act that directly authorize the state commissions to establish prices confirms to us that Congress did not envision the FCC's participation in determining [prices]." Pet. App. 13a. But once §§ 251(d)(1) and 201(b) are properly recognized as

affirmative grants of rulemaking authority, the purported negative inference arising from § 252(c)(2) loses all its force. *See Field v. Mans*, 516 U.S. 59, 67-68 (1995) (negative inference from legislative silence "should not be elevated to the level of interpretive trump card," particularly where it would yield "odd" results).

This Court made precisely the same point in its recent decision in *Lexecon*, 118 S. Ct. at 962. In assessing the nature of the obligation of the Judicial Panel on Multidistrict Litigation to remand a previously transferred case back to its original jurisdiction for trial, the Court rejected the argument that the absence of any mention of the Panel's obligation in § 1407(b) trumped the explicit assignment of that obligation in § 1407(a). Noting that "a statute is to be considered in all its parts," this Court reasoned that:

> to emphasize that § 1407(b) says nothing about the Panel's obligation when addressing a transferee court's powers is simply to ignore the necessary consequence of self-assignment by a transferee court: it conclusively thwarts the Panel's capacity to obey the unconditional command of § 1407(a).

Id. at 962. Similarly, to emphasize that § 252(c)(2) says nothing about the FCC's authority to establish a pricing methodology "conclusively thwarts" the FCC's ability to exercise the authority conferred by §§ 251(d)(1) and 201(b).

More fundamentally, however, § 252 is not silent: it expressly instructs state commissions to resolve "any open issue" in arbitrations in accordance with "the requirements of section 251 of this title, *including the regulations prescribed by the Commission pursuant to section 251*." 47 U.S.C. § 252(c)(1) (emphasis added). The question of what pricing methodology to use in establishing rates in a § 252 adjudication is plainly one such "open issue." Congress did not need to repeat that instruction when, in the immediately following subsection, it authorized state commissions to "establish" the actual rates. 47

U.S.C. § 252(c)(2). Thus, there is no basis in the statutory text for concluding that Congress intended to deny the FCC authority to implement the pricing requirements of § 251.[21]

3. The legislative history of the 1996 Act confirms what the text makes plain. The bills passed by both houses of Congress indisputably granted to the FCC authority to implement all of the Act's local competition requirements, including its pricing requirements. The House bill expressly instructed the FCC to "establish regulations to implement the requirements of this section," and made specific mention of pricing requirements. H. Rep. at 143, §§ 242(b)(4)(A), (C). In the Senate version, the substantive provisions that are now divided between § 251 and § 252 were contained in a single section, which also included a provision instructing the FCC to "implement the requirements of this section." S. Rep. at 93, § 251(i)(1).[22] In reconciling the relevant provisions of these two bills, the Conference Committee made quite clear that it intended no substantive changes: the Confer-

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[21] At a minimum, §§ 251 and 252 do not convey an "unambiguously expressed intent" on the part of Congress to deny the FCC authority to implement § 251's pricing requirements. *See Holly Farms Corp.*, 116 S. Ct. at 1407 (O'Connor, J., concurring in part, dissenting in part) (*quoting Chevron*, 467 U.S. at 842-43). Thus, the Eighth Circuit was wrong to conclude on this basis that it did not owe the FCC's interpretation of the 1996 Act any deference. *See generally Chevron*, 467 U.S. at 842-46; *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 382 (1988) (Scalia, J., concurring) (*Chevron* deference extends to agency's determination of the scope of its own authority). Indeed, the Eighth Circuit was wrong as a matter of law in concluding that the mere "absence of any FCC pricing authority" (Pet. App. 13a) constituted the kind of clear Congressional statement necessary to override an agency's interpretation of its authority. Under *Chevron*, when a statutory provision is "silent or ambiguous with respect to [a] specific issue," reviewing courts must defer to any reasonable agency interpretation. 467 U.S. at 843.

[22] The Senate bill also directed state commissions to comply with the FCC's regulations in conducting arbitrations. S. Rep. at 91-92, § 251(d)(5)(A), (D).

ence report states that where no change was noted, no substantive change was intended,[23] and that report nowhere suggests any intent on the part of Congress to take away from the FCC any of the implementing authority each House of Congress had given it. *See Mead Corp. v. Tilley*, 490 U.S. 714, 723-24 (1989) (where conference committee noted differences between final version of statute and predecessor bills, it is reasonable to assume that had committee intended a change to be substantive, it would have discussed it); *Union Elec. Co. v. EPA*, 427 U.S. 256, 262-63 (1976). Moreover, there is no reason to think the Conference Committee intended to reduce radically the scope of the FCC's jurisdiction in light of the Senate rule forbidding Conferees from eliminating matters agreed to by both Houses. *See* Standing Rules of the Senate, 104th Cong., Rule XXVIII, c. 2.

B. The Eighth Circuit's Decision to Strip the FCC of Authority to Issue Pricing Regulations Is Utterly at Odds With the Structure and Purposes of the 1996 Act.

The structure and purposes of the 1996 Act also compel the conclusion that Congress granted the FCC authority to implement all of § 251—including its pricing requirements. The 1996 Act does more than merely commit the nation to a policy of competition in local telephone markets. It also establishes a process designed to open local markets as quickly as possible, and to manage an orderly transition to Bell Company participation in long distance markets. Granting the FCC authority to implement the Act's pricing requirements is fully consistent with this process because it ensures rapid and uniform national execution of Congress' objectives. Stripping the FCC of that authority, in contrast, stands as a serious obstacle to the

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[23] *See* Conf. Rep. at 113 ("The differences between the Senate bill, the House amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clerical changes.").

practical operation of the process set forth in the 1996 Act.

1. The essential outlines of the Congressional plan are clear on the face of the statute:

First, uniform substantive federal law now governs competitive relations in local service, displacing the prior state regimes which were (with a few exceptions) antithetical to local competition. The basic federal requirements have been announced by Congress, are to be implemented in detailed regulations by the FCC, and are ultimately to be enforced by federal district courts with exclusive jurisdiction to ensure that state commissions have met the requirements of §§ 251 and 252 and implementing FCC regulations.

Second, speed is critical. The 1996 Act is replete with action-forcing deadlines—most importantly the requirement that the FCC issue its regulations within six months of the Act's passage. Congress made clear that it wanted national rules in place before the § 252 arbitration process was underway, in order to narrow the range of issues subject to legal dispute and to rein in the incumbents' natural incentives to obstruct the process:

> it is important that the *Commission rules to implement new section 251* be promulgated within 6 months . . . so that potential competitors w[ould] have the benefit of being informed of the Commission['s] rules in requesting access and interconnection.

Conf. Rep. at 148-49 (emphasis added). Additionally, the substantive validity of the FCC's rules could be settled quickly, in a single proceeding before a single federal court of appeals.

Third, States play a critical role in implementing the new federal policy, but a role that differs fundamentally from that of the federal government. Federal authorities announce the law; States apply it. Congress permitted States to assume that role for two obvious reasons: (i) by virtue of their long history of regulating local service,

state authorities have the factual knowledge needed to translate the new federal requirements into action; and (ii) permitting the States to assume this responsibility will bring about competition much faster than would the alternative of assigning this responsibility to the FCC, which would have been administratively overwhelmed by an effort of this magnitude.

Fourth, the FCC's responsibility under § 271 of the 1996 Act to decide whether the Bell Companies can enter long distance markets in their region is inextricably linked to the FCC's responsibility to implement the Act's local competition provisions. The FCC may not grant such authority to a Bell Company unless the FCC finds, *inter alia,* that the Bell Company has met the requirements of § 251.

2. By stripping the FCC of pricing authority, the Eighth Circuit has scuttled the coherent regulatory approach created by Congress and replaced it with an incoherent jurisdictional scheme in which authority is dispersed among the FCC, state commissions, and federal courts without any rhyme or reason—thereby "frustrat[ing] the statute's practical operation as well as its formal command." *See Oubre v. Entergy Operations, Inc.,* 118 S. Ct. 838, 842 (1998).

a. The Eighth Circuit's decision has made it far more difficult to bring competition to local markets "as quickly as possible." *See* H. Rep. at 89 (action within 15 months thereafter). As a result of the Eighth Circuit's action, uniform national pricing rules were not in place to govern the onslaught of § 252 arbitrations that followed passage of the 1996 Act. The Eighth Circuit thus opened the door to what Congress had acted to prevent: state-specific trench warfare over the meaning of the Act's pricing requirements. Dozens of cases are now pending across the country in federal district courts, challenging the pricing determinations of state commissions as inconsistent with the requirements of § 251. If the Eighth Circuit's decision is not reversed, this trench warfare will persist

for years. Once the federal courts of appeals (and perhaps this Court) have settled on a uniform meaning of the Act's pricing requirements, the inevitable result will be invalidation of some state decisions, requiring those States to revise fundamental assumptions years after initial determinations have been made. Not only will this process waste substantial resources, it promises tremendous delay in the introduction of actual competition, as competitors wait for federal courts to sort through the Act before making (or resuming) the multi-billion dollar investments necessary to compete meaningfully in local markets.

b. In addition, the Eighth Circuit's jurisdictional ruling cannot be reconciled with the plain text of § 271 of the 1996 Act—the provision governing whether Bell Companies will be permitted to provide interstate long-distance service to customers in their regions—and undermines coherent administration of that provision. Section 271 specifically vests the FCC with the authority to decide when a Bell Company should be permitted to enter the long distance market in its home region. In making that determination, the FCC must "find" that the Bell Company has satisfied all requirements of § 271's "competitive checklist," which is designed to test whether its local market has become competitive. § 271(d)(3). The checklist expressly includes many of the requirements of § 251, including its pricing requirements. § 271(c)(2)(B). As the D.C. Circuit recently explained, the FCC must find "to its own satisfaction" that the statutory requirements are met, because "Congress has clearly charged the FCC, and *not the State commissions,* with deciding the merits of the [Bell Companies'] requests for interLATA authorization." *SBC Communications Inc. v. FCC,* 1998 WL 121492 at *6. Thus, the Eighth Circuit has denied the FCC the authority to issue regulations prescribing a pricing methodology sufficient to satisfy the requirements of § 251(c)(3), even though the plain text of § 271 directs the FCC to reject an application for long distance authority if it determines that the prices set by a State do not satisfy the requirements of § 251(c)(3).

The Eighth Circuit has, of course, sought to square the circle by issuing a mandamus order denying the FCC the very authority that the text of § 271 (and the recent D.C. Circuit decision) insist the FCC must exercise respecting pricing issues. *See* Order on the Motions (JA 284-301) (FCC must "confine its pricing role under [§] 271(d)(3)(A) to determining whether applicant [Bell Companies] have complied with the *pricing methodology and rules adopted by the state commissions and in effect in the respective states in* which such [Bell Companies] seek to provide in-region, interLATA services") (emphasis added). That ruling (which is the subject of a separate petition for certiorari) cannot be correct. Although the Eighth Circuit has tied the FCC's hands respecting state pricing determinations, federal courts are free to invalidate state pricing determinations that the Eighth Circuit has forced the FCC to accept in adjudicating § 271 applications—thus creating the possibility of genuine chaos in the long distance market, as the FCC is forced (by judicial decisions in § 252 cases invalidating state pricing decisions) to revoke long distance authority it previously was forced to grant as a result of the Eighth Circuit's ruling. Similarly, the D.C. Circuit in reviewing an FCC decision under § 271 would presumably be free (as the FCC, according to the Eighth Circuit, is not) to disagree with the State's pricing determination in deciding whether a Bell Company had met the statutory standards for obtaining long distance authority. Congress cannot possibly have intended such chaos. That the Eighth Circuit would be driven by the logic of its original decision to such an implausible and impractical conclusion about the FCC's § 271 authority is a powerful indicator that the original decision is wrong.

c. The Eighth Circuit's decision is also impossible to reconcile with a host of other provisions in the Act. It cannot, for example, be squared with § 410, 47 U.S.C. § 160, which grants the FCC the authority to forbear from enforcing any regulation or provision of the Act (relating *inter alia* to "charges")—including the pricing

provisions of § 251(c). Congress has given the FCC the power to suspend enforcement of the requirements of § 251(c)—including its pricing requirements—if the FCC decides those requirements have been fully implemented, and are no longer necessary to promote competition or protect the public interest. 47 U.S.C. §§ 160(a)(1), (d). In order to exercise that authority, the FCC must necessarily decide what the pricing requirements of § 251 mean. Once the FCC makes such a decision, a State is forbidden from continuing to enforce those requirements. *Id.* § 160(e). It would have been entirely capricious to deny the FCC authority to issue regulations implementing those requirements in the first instance.

Nor can the Eighth Circuit's ruling be squared with the plain text of § 208, which gives the FCC authority to adjudicate complaints by "[a]ny person . . . complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof." 47 U.S.C. § 208. Indeed, much as it did with § 271, the Eighth Circuit had to ignore the plain language of the statute in order to vindicate its view of the proper scope of FCC authority. *See* Pet. App. 30a-34a (holding that FCC may not consider § 208 complaints alleging violations of § 251). *But see* § 252(d)(3) ("in prescribing and *enforcing* rules to implement the requirement of this Section. . . .") (emphasis added). And the Eighth Circuit did not explain how its ruling could be squared with § 253 of the 1996 Act, which authorizes the FCC to preempt any state-set requirement (including pricing requirements) that effectively prohibits entry into intrastate markets.

3. The Eighth Circuit's construction of the 1996 Act must be rejected because it destroys the prospects for coherent national administration of the Act and, by haphazardly dispersing decisional authority under the Act, "would yield an incoherent jurisdictional scheme." *See Bank One Chicago v. Midwest Bank & Trust Co.*, 516 U.S. 264, 275 (1996) (rejecting interpretation of § 4010 of Expedited Funds Availability Act because it would

randomly disperse authority for deciding related claims among state and federal agencies and courts). Under the Eighth Circuit's approach, the FCC has the authority to implement some substantive requirements of § 251 (such as deciding what network elements should be unbundled). States must follow those FCC implementing regulations when adjudicating disputes pursuant to § 252, and are subject to federal court review to ensure conformity with the FCC's rules. However, for other substantive requirements of § 251—including the critical pricing requirements—States are now free, in the first instance, "to dictate the substantive standards" that will apply, Pet. App. 30a. No coherent rationale exists for why Congress would have chosen the distribution of jurisdictional authority resulting from the Eighth Circuit's decision.

In view of all the adverse consequences flowing from the Eighth Circuit's decision—the delay and uncertainty it is causing, its incompatability with §§ 271, 410, 208 and 253, and its incoherent allocation of jurisdictional responsibilities—that decision simply cannot be a correct reading of the 1996 Act.

4. This litany of adverse consequences cannot be justified on the only ground thus far offered—federalism. At bottom, the Eighth Circuit appeared to believe its ruling was necessary to protect the States' traditional regulatory authority over intrastate telecommunications matters. But States had such authority as a result of a decision *by Congress* in 1934 to allocate regulatory responsibility in that way. There can be no question, however, that Congress has sufficient authority under the Commerce Clause to regulate intrastate telecommunications services, and the 1996 Act represents an unambiguous decision on the part of Congress to preempt traditional state laws restricting competition in local markets. Section 251 prescribes comprehensive substantive federal requirements governing carrier-to-carrier relationships in the intrastate market. Moreover, Congress indisputably gave the FCC authority to prescribe binding national rules governing many important requirements of § 251, including all of its substantive unbundling

requirements and many of the resale requirements of § 251(c)(4). FCC rules in these areas govern intrastate matters fully as much as did the pricing rules invalidated by the Eighth Circuit. Indeed, Congress has gone even further, expressly preempting all state laws restricting competition in local markets (§ 253), and mandating an end to the old regime of hidden subsidies associated with monopoly rate-of-return regulation (§ 254). A plausible defense of the Eighth Circuit's decision therefore cannot rest on broad brush invocations of federalism. It must instead explain why Congress would have chosen to deny the FCC authority to implement one critically important subset of nationally uniform federal requirements under § 251 while granting the FCC authority to implement other important requirements contained in the same provision, and granting the federal courts (while denying state courts) the power to review even the provisions initially assigned to the States. No such explanation has even been attempted.

Nor is there a plausible case to be made that Congress simply decided to leave the critical question of pricing methodology to the States' discretion. To begin with, the legitimacy of any such delegation of federal substantive authority would be suspect. Congress may of course delegate such authority to federal agencies, but only because they are supervised by the President and thus accountable to the national electorate. State agencies lack that political accountability. *See Printz v. United States*, 117 S. Ct. 2365, 2378, 2381 (1997) (unlawful to transfer federal executive power to "the 50 States, who are left to implement the program without meaningful Presidential control"); *Bowsher v. Synar*, 478 U.S. 714, 733 (1986) ("[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law"). Indeed, that is why federal courts do not accord *Chevron* deference to state agency interpretations of ambiguous provisions of federal law,[24] and have uni-

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[24] *See, e.g., AMISUB v. Colorado Dep't of Social Services*, 879 F.2d 789, 795-96 (10th Cir. 1989); *Turner v. Perales*, 869 F.2d 140, 141 (2d Cir. 1989).

formly rejected such deference in adjudicating cases pursuant to § 252(e)(6) of the 1996 Act.[25] Moreover, Congress' decision to vest federal courts with exclusive jurisdiction to ensure that state commissions have complied with the requirements of § 251 is a powerful indication that Congress intended uniform national interpretations of those requirements.

For all these reasons, the Eighth Circuit erred in concluding that Congress intended in the 1996 Act to deny the FCC authority to issue nationwide regulations establishing pricing methodologies.

C. Section 2(b) of the 1934 Act Does Not Deny the FCC the Authority to Issue Rules Implementing the Pricing Requirements of the 1996 Act.

The Eighth Circuit's invalidation of the FCC's pricing rules cannot be sustained on the alternative ground that it is compelled by § 2(b) of the 1934 Act, 47 U.S.C. § 152(b). Relying on § 2(b) and this Court's preemption decision in *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986), the Eighth Circuit concluded that the FCC lacked jurisdiction over intrastate matters unless the Communications Act "*both* unambiguously appl[ied] to intrastate telecommunication matters *and* unambiguously direct[ed] the FCC to implement its provisions." Pet. App. 19a (emphasis in original). In the Eighth Circuit's view, because the 1996 Act did not "unambiguously direct" the FCC to implement its provisions, and because no other exception to § 2(b) was applicable, the FCC had no jurisdiction to prescribe regulations implementing many of the substantive provisions of the 1996 Act, including those involving pricing.

That holding is indefensible. Even under the Eighth Circuit's restrictive approach, § 2(b) does not preclude

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[25] *See, e.g., US West v. MFS Intelnet*, No. C97-222WD, Order on Motions for Summary Judgment (W.D. Wash. Jan. 7, 1998); *US West v. Hix*, No. 97-D-152, Memorandum Opinion and Order (D. Colo. Dec. 5, 1997).

the FCC's assertion of jurisdiction under the 1996 Act, because the Act "straightforward[ly]" and "unambiguous[ly]" *both* applies to intrastate matters *and* gives the FCC jurisdiction over those matters. More important, the Eighth Circuit misunderstood the nature of § 2(b). That section simply limits the FCC's *ancillary* jurisdiction over intrastate matters not governed by substantive federal law; it has no role when, as here, a provision of the Act indisputably applies to intrastate matters. The court's contrary interpretation was based on a fundamental misreading of *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986). *Louisiana* addressed whether the FCC had ancillary jurisdiction to preempt state laws governing certain aspects of intrastate services; *Louisiana* is thus inapplicable to this case, in which Congress has plainly preempted state law, and the only question is whether the FCC or the state commissions will have authority to implement the federal law. Finally, the Eighth Circuit's decision must be reversed because that court misapplied § 2(b)'s "inseverability" exception. *See Louisiana*, 476 U.S. at 375 n.4.

1. All that § 2(b) creates is a rule of construction—a presumption—that the Communications Act does not apply to, and that the FCC lacks jurisdiction over, intrastate matters. The presumption governs, of course, only in the absence of congressional intent to the contrary. *See Louisiana*, 476 U.S. at 377. When Congress in an "unambiguous" or "straightforward" manner demonstrates either an intent to reach intrastate communications service or to give the FCC jurisdiction over such service, § 2(b)'s rule of construction simply has no application.[26]

Here, Congress has done both. As demonstrated, *see supra* pp. 4-7, 34, and as the Eighth Circuit acknowledged, §§ 251 and 252 "clearly apply to intrastate telecommuni-

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[26] This rule is consistent with the well-established rule that a more specific statute controls a more general one. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992).

cation service." Pet. App. 19a. Indeed, one of the principal purposes of the 1996 Act was to open to competition local—*i.e.*, intrastate—telephone service, and the provisions of the Act unambiguously implement that purpose.[27] As we have also demonstrated above, it is equally clear that the 1996 Act provides in a straightforward and unambiguous manner for FCC jurisdiction to implement these federal statutory provisions. Section 251(d)(1) expressly empowers the FCC to issue regulations "to implement the requirements of this section." And § 201 of the Communications Act provides unambiguously and without limitation that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." Clearer congressional authorization for FCC action can hardly be imagined. *See* Part II(A). Thus, even under the Eighth Circuit's dual test—requiring both explicit coverage in federal legislation *and* explicit authorization of FCC regulations—the § 2(b) presumption is overcome.

2. Moreover, the Eighth Circuit misunderstood the requirements of § 2(b). Although the Eighth Circuit conceded that the 1996 Act created uniform *federal* standards to govern pricing and other aspects of intrastate services, it concluded that the FCC lacked jurisdiction to issue regulations implementing those standards, because the FCC allegedly had not received "unambiguous direction" from Congress. That conclusion is inconsistent with the text and history of § 2(b) and is not required by any precedent of this Court.

The Eighth Circuit's faulty conclusion about the need for "unambiguous direction" arose largely from its misreading of *Louisiana*, which it viewed as standing for the proposition that "section 2(b) 'fences off' intrastate matters from FCC regulation." Pet. App. 15a. In *Louisiana*,

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[27] *See, e.g.*, § 251(c)(2) (interconnection to local network facilities), § 251(c)(4) (resale of local telephone service); § 251(c)(3) (access to the unbundled elements of the local network); § 252 (framework for generating agreements between incumbent LECs and new entrants); § 254 (universal service).

the Court faced the quite different question whether the FCC had the power to issue depreciation regulations that preempted contrary requirements established under state law for intrastate service. *See* 476 U.S. at 358. The statutory provision at issue, § 220(b) of the Act, provided that the Commission "shall . . . prescribe" regulations governing the treatment of depreciation by common carriers. *Id.* at 366. There was thus no question that the statute applied to—and that the FCC had jurisdiction to regulate—depreciation rates for *interstate carriers.* The statute, however, made no reference to *intrastate* matters, and did not otherwise contain clear indications that such matters were within the statute's purview. The Court's conclusion that, against the background of § 2(b), the FCC had not been clearly granted the power to preempt contrary state depreciation schedules with respect to intrastate rates was, therefore, a rejection of the FCC's exercise of *ancillary* jurisdiction, *i.e.*, the FCC's jurisdiction over matters to which the Act did not directly apply. *Id.* at 371-73. The Court's decision did not at all address the issue presented here—namely, whether the FCC has the power to regulate intrastate matters when Congress has unambiguously determined that federal law applies to those matters.

When Congress has enacted laws expressly governing intrastate matters, § 2(b) does not require Congress to use unusually clear and specific language to authorize the FCC to implement those laws. In other words, § 2(b) restricts the FCC's ancillary jurisdiction, not its ability to enforce substantive federal law. That § 2(b) was intended only as a limit on the FCC's exercise of ancillary jurisdiction is confirmed by the existence of § 201(b). Section 201(b) states, unambiguously and without limitation, "The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." Prior to passage of the 1996 Act, § 201(b) and § 2(b) were complementary and mutually reinforcing provisions. The plain text of § 201(b) gave the FCC authority to "prescribe rules and regulations" for all provisions of the Act, which then ap-

plied only to interstate matters, while at the same time the plain text of § 2(b) precluded the FCC from regulating purely intrastate matters (to which the Act did not then apply).

Following the passage of the 1996 Act, however, the Eighth Circuit treated these complementary provisions as conflicting. Under the Eighth Circuit's construction of § 2(b), § 2(b) deprived the FCC of authority to implement the provisions of the 1996 Act, while the plain text of § 201(b) gave the FCC that same authority. The Eighth Circuit resolved this tension by concluding that § 2(b)'s provision governed, in derogation of the unambiguous command of § 201(b). This resolution was accomplished by judicial fiat, without reference to the history of either § 201(b) or § 2(b).

This history makes clear that the tension between the plain meaning of § 201(b) and § 2(b) resulting from the Eighth Circuit's decision is the result not of poor congressional drafting, but of the Eighth Circuit's misreading of § 2(b). Section 2(b) was enacted to overrule *Houston E. and W. Texas Ry. Co. v. United States,* 234 U.S. 342 (1914) (*Shreveport*). The *Shreveport* decision upheld the ICC's preemption of intrastate state agency ratemaking, even though the Interstate Commerce Act (ICA) specified that its provisions "shall not apply to" intrastate matters. 234 U.S. at 356-57. The Court reasoned that the state agency had set an unnaturally low rate for intrastate traffic, which resulted in a form of discrimination against interstate traffic. This discriminatory effect on interstate commerce was held sufficient to give the ICC "jurisdiction" over the intrastate rate even though, by its terms, the ICA did not apply to intrastate services. *Id.* The *Shreveport* Court, in other words, permitted the ICC to exercise "ancillary" jurisdiction over intrastate matters even where the statute made clear that federal law did not "apply" to those matters.

The history of § 2(b) leaves no doubt that the 1934 Congress (which modeled the Communications Act on the

Interstate Commerce Act) adopted § 2(b)—and in particular § 2(b)'s limitation on the FCC's jurisdiction—to prevent application of *Shreveport*'s ancillary jurisdiction doctrine to the telecommunications field. *See generally A Legislative History of the Federal Communications Act of 1934* (Max D. Paglin ed. 1989) at 53-59.[28] *See also NARUC v. FCC*, 746 F.2d 1492, 1500 (D.C. Cir. 1984) (Bork, J.) ("Section 152(b) merely confirms that the States retain jurisdiction over purely intrastate calls notwithstanding the economic effect such State jurisdiction might have on the interstate market. Section 152(b) thus prevents the application of the so-called *Shreveport* rate decision . . . to the communications field.") (internal citation omitted).[29] Congress incorporated the ICA's prohibition that the Act not "apply" to intrastate matters, and then added a new prohibition to prevent the FCC from exercising jurisdiction over matters to which federal law did not otherwise apply. The latter provision thus prevented the FCC from using the *Shreveport* decision to circumvent Congress' decision as to the scope of federal law. Thus, § 2(b) makes clear that the FCC may *regulate* no further than Congress has chosen to *legislate*; it was at enactment, and remains, a bar only to the FCC's exercise of *ancillary* jurisdiction over intrastate services to which the Act does not otherwise apply.

If § 2(b) is read, as it was intended, to prevent only the FCC's exercise of ancillary jurisdiction, then § 201(b) and § 2(b) can each be given full effect. Section § 201(b) gives the FCC jurisdiction to regulate intrastate matters when Congress has unambiguously intended for federal law to apply to those matters, and § 2(b) bars the FCC

[28] *See* Senate Hearings on S. 2910 (March 14, 1934), at 179 (colloquy between Senators Dill and Long). *See also id.* at 154 (statement of K.R. Clardy); 78 Cong. Rec. 8823 (May 15, 1934) (statement of Chairman Dill).

[29] *See North Carolina Util. Comm'n v. FCC*, 552 F.2d 1036, 1047 (4th Cir. 1977) ("in enacting the Communications Act [of 1934], Congress sought to deny the FCC the kind of jurisdiction over local rates approved by the Shreveport Rate Case").

from exercising ancillary jurisdiction over intrastate matters when, as is the case with the establishment of consumer rates for intrastate services, federal law does not unambiguously apply. The sections thus remain, after the 1996 Act as they were before the 1996 Act, complementary.

In sum, the 1934 Act erected a presumptive partition between interstate matters—which were governed by federal law—and intrastate matters—which were governed by state law. Section 2(b) helped to maintain that partition by cabining the reach of federal law and of the FCC's corresponding jurisdiction. In the 1996 Act, Congress unambiguously made federal law applicable to intrastate matters that had previously been under the sole control of state commissions. Because Congress left no doubt that federal law applies to these intrastate matters, § 2(b) simply has no application to FCC rules implementing that federal law. The Eighth Circuit's failure to recognize § 2(b)'s inapplicability in such circumstances has resulted in an illogical and unprecedented regime that mocks the congressional intent to which it professes allegiance.

3. As if this were not enough—and it is—the FCC's implementation of the federal requirements of §§ 251 and 252 also falls squarely within § 2(b)'s "inseverability" exception. Under that exception, § 2(b) does not preclude FCC regulation of intrastate facilities when "it [is] not possible to separate the interstate and intrastate components of the asserted FCC regulation." *Louisiana*, 476 U.S. at 375 n.4. *See, e.g., California v. FCC*, 39 F.3d 919, 933 (9th Cir. 1994); *Public Utility Commission of Texas v. FCC*, 886 F.2d 1325, 1334 (D.C. Cir. 1989).

That exception—were it necessary—applies here. Because the new relationships mandated by § 251 will allow interstate uses of incumbents' facilities, *e.g.*, to originate and terminate interstate long distance calls, they have "interstate aspects" that are within the FCC's jurisdiction.[30]

[30] *See Local Competition Order* ¶¶ 87, 89, Pet. App. 192a-194a; Conf. Rep. at 123 (it is "the conferees' intent that the provisions

And, although the 1934 Act generally provided for separate spheres in which States regulate rates for intrastate services, while the FCC regulates rates for interstate services, the new regulatory paradigm envisioned by Congress and adopted in the 1996 Act, *see Local Competition Order* ¶¶ 83, 92, Pet. App. 190a-191a, 194a-195a; *see supra* pp. 4-8, eschews traditional jurisdictional boundaries and requires the States and the FCC to exercise parallel and complementary jurisdiction, with the FCC adopting regulations that affect both the interstate and intrastate aspects of interconnection, and with the States applying those regulations to local conditions to develop specific interconnection arrangements and prices. Because the Act's federal interconnection requirements contemplate carrier-to-carrier agreements that have *a single set of rates, terms, and conditions* and that apply without distinction to both interstate and intrastate uses of newly created local networks, the Act does not permit the new interconnection arrangements to be separated into "interstate aspects" and "intrastate aspects" that would be separately regulated. *See Local Competition Order* ¶ 92, Pet. App. 194a-195a. Thus, the Eighth Circuit's suggestion that a separations process could be used to allow the FCC to set rates for interstate uses of the local network, *see* Pet. App. 20a, therefore is flatly inconsistent with Congress' intent that a new regulatory paradigm—with a single rate—govern those agreements. Indeed, if Congress had intended for there to be different rates for the intrastate and interstate uses of the local network, it would no doubt have said so, and would have specified different procedures for establishing those different rates.[31]

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of new section 251 are in addition to, and in no way limit or affect, the Commission's existing authority regarding interconnection").

[31] Indeed, no petitioner or other party to the FCC proceedings contended that the new duties of § 251 and § 252 could or should be divided between "interstate aspects" and "intrastate aspects" that the FCC and the States would separately regulate. *See Local Competition Order* ¶ 92, Pet. App. 194a-195a.

It is also no answer to assert, as the Eighth Circuit did, that the local competition provisions of the Act have only a "tangential impact" on interstate services. Pet. App. 22a-23a. Given that the incumbents receive over 20% of their revenues from *interstate* exchange access,[32] that suggestion is unsustainable. It is also beside the point. The FCC has undisputed authority to regulate interstate services, including the facilities and agreements relating to the provision of those services. Under the inseverability exception, if there is no basis for separating the interstate aspects of those facilities and agreements from the intrastate aspects, the FCC has jurisdiction regardless of the fraction of that service that is interstate.

Nor is it either accurate or relevant to state that the FCC "has no valid pricing authority over these areas of new localized competition." Pet. App. 21a. For the reasons stated above, *see* Parts II(A), (B), the Eighth Circuit's conclusion regarding the FCC's jurisdiction over intrastate matters is incorrect. In any event, the relevant point is that there is no indication that Congress intended to oust the FCC of its traditional jurisdiction over *interstate* matters (*see* n.30, *supra*), jurisdiction which is inextricably intertwined with the intrastate matters which the Eighth Circuit believed were not subject to the FCC's jurisdiction.

In sum, because it requires no "construction" to find an express grant of FCC jurisdiction over the substantive terms of the 1996 Act, § 2(b)'s rule of construction does not apply. And even if it did, application of § 2(b) would lead to the same result that obtains in its absence: the FCC properly exercised jurisdiction over the pricing requirements of the 1996 Act.

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[32] *See* FCC, *Telecommunications Industry Revenue: TRS Fund Worksheet Data* (Nov. 1997) at Table 18B.

CONCLUSION

The Eighth Circuit's decisions invalidating § 51.315(b) of the FCC's rules, and stripping the FCC of plenary authority to implement the requirements of § 251 of the 1996 Act, should be reversed.

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